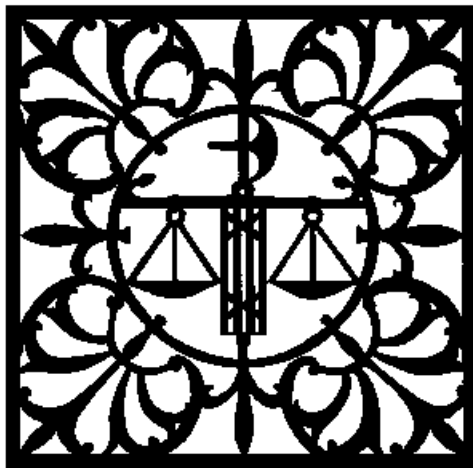


# **Gender and Justice: Implementing Gender Fairness in the Courts**



October 23, 1996

Nebraska Supreme Court

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# Introduction

The Nebraska Supreme Court in 1991 established by resolution a Task Force on Gender Fairness. The charge of the task force was to:

1. Explore the extent to which gender bias existed in the Nebraska State Court system;
2. Document, where found, the existence of discriminatory treatment of various participants in the system;
3. Recommend methods to eliminate gender bias in the courts;
4. Report the findings to the Nebraska Supreme Court; and
5. Design a method for the monitoring of approved reform measures and evaluate their effectiveness in assuring gender fairness in the processes of the courts.

Task force members who were appointed included 13 judges, 12 attorneys, and 10 lay members. The task force conducted an investigation of gender issues in the areas of family law, domestic violence and sexual assault, and civil damage awards. Other areas of focus included the questions of disparate treatment based on gender in the judicial selection process, in courtroom interactions, and in criminal sentencings.

After a multi-year and multifaceted study, the final report of the Task Force on Gender Fairness was published in December 1994. The findings and recommendations were based on statewide survey data, from judges, attorneys, and court personnel; information and observations from public hearings; and state and national statistical reports. Consistent with other states completing similar studies, the findings in this study showed that perceptions of gender fairness vary with the participants in the Nebraska court system. Women attorneys and litigants reported observing gender biased behavior in the Nebraska courts at higher frequencies than those observed by judges, male attorneys, and court personnel.

The following first general recommendation of the report of the Task Force on Gender Fairness was to encourage the Nebraska Supreme Court to establish a committee to assist in the implementation of the recommendations.

***Continue the Gender Fairness Task Force toward implementation of recommendations. Specifically, a committee to oversee implementation should be established, including representatives from the judiciary, court administration, bar, law schools, and lay persons. The Implementation Committee should:***

- a) ***Ensure that educational programs address the needs determined by the Task Force, as those needs are set out specifically in the recommendations that follow.***
- b) ***Publicize the findings of the task force and make further recommendations based on the implementation of these recommendations.***
- c) ***Monitor positive progress and identify new problem areas.***

- d) *Seek funding for implementation of the task force recommendations and any additional studies deemed necessary as those studies are set out in the recommendations that follow.*
- e) *Evaluate progress on a regular basis.*

Demonstrating its commitment to this issue, the Nebraska Supreme Court appointed Justice John Gerrard to be the chairperson of a Gender Fairness Implementation Committee. In August 1995, Justice Gerrard selected committee members from the bench, court administration staff, and representatives from the Bar, law schools, and the general public. The committee's purpose was to establish and monitor an implementation plan for the recommendations set out by the task force. The Gender Fairness Implementation Committee met in October 1995, to consider and prioritize recommendations from the task force. Justice Gerrard appointed several subcommittees to focus on these recommendations in the areas of Education, Courtroom Interaction, Litigation, Judicial Selection Process and Domestic Violence and Sexual Assault. A public hearing was held in October 1995 to solicit responses to these recommendations from members of the Bar and the general public.

The subcommittees worked independently for a period of 9 months in developing proposed plans to implement the task force recommendations. The Nebraska Supreme Court has considered the Implementation Committee recommendations and renders the following progress report.

Recognizing that gender fairness is a work in progress, the following chapters reflect the status of several recommendations from the Gender Fairness Implementation Committee. The Implementation Committee is dedicated to the task of completing this important work and continuing to ensure gender equity in the court system for all participants.

# Chapter 1 - Education



# Education

The need for education appears in all issues of gender fairness. Gender bias behaviors are often subtle, unintended, and even unconscious, but still adversely affect participants in the judicial process. Information and discussions to increase awareness of the issues of gender fairness can prevent or correct situations that are perceived as biased.

## ***Recommendations:***

- !** *Develop a comprehensive educational format including the incorporation of gender fairness training into judicial education programs and court personnel programs; and encourage the incorporation of gender fairness training in all Nebraska Continuing Legal Education (NCLE) programs.*
- !** *The educational format should be monitored and updated on an annual basis to ensure that gender fairness training is being interwoven with other aspects of training for judges, lawyers, and court personnel.*

## **Attorneys as employers, colleagues, and officers of the court**

1. Have gender fairness issues included periodically in the discussions held at Bench/Bar Conferences.
2. NCLE should encourage individuals chairing the various continuing legal education seminars to include gender fairness issues as they apply to the particular substantive areas being presented (i.e., Employment Law, Family Law, Criminal Law, Damages, Tax, and Corporate/Partnership Law).
3. Encourage funding for, and commission the development of, a video on gender fairness that could be made available to seminar presenters or persons seeking programs on the topic, i.e., local bar associations.
4. Through NCLE, develop a “Train the Trainer” program to encourage both men and women to be trained to present the issue at local bar association meetings, community organization meetings, etc.
5. Encourage local bar associations to have gender fairness as a topic of discussion at its meetings.
6. The Bar Association House of Delegates should be encouraged to adopt a resolution stating the NSBA’s commitment to eliminate gender-based discrimination within the profession and within Nebraska’s judicial system.

7. The NSBA should be encouraged to distribute the pamphlet “Fair and Effective Interviewing” to all members of the NSBA addressing the attorney as an employer and avoiding gender bias in that role. (See Appendix A.)
8. Encourage the development of articles on gender fairness issues for inclusion in the Omaha and Lincoln Bar Associations’ newsletters and the NSBA Bar Journal.
9. Encourage the issue of gender fairness be addressed periodically at the annual Bar meeting.

### **Judges and Court Staff**

1. Judges should receive periodic training and education concerning the effects of gender bias on attorneys, court personnel, judges, witnesses, and juries, and methods for avoiding it. The training should heighten the awareness of judge to the possibility that gender is influencing their decision-making. If possible, this training should be provided in a form that involves judges as active participants and not merely as an audience.
2. Encourage funding for and commission the development of gender fairness curriculum to be included in new judge orientations. A short video presentation may be the best way to deliver the message.
3. Encourage the inclusion of gender fairness issues for discussion at the annual meetings of the county judges and the district judges.
4. The Implementation Committee or the State Court Administrator’s office should develop written articles to be distributed to judges and court staff advising them of their obligation not to discriminate based upon gender.
5. Court staff throughout the state should continue to receive periodic training and education addressing gender fairness, promoting neutral hiring procedures, and equitably enforcing gender neutral personnel policies.
6. Continue to encourage court personnel to treat all female judges, attorneys, litigants, witnesses, and other court personnel in a professional manner and with equal deference and respect accorded their male counterparts and to avoid stereotyping based on gender.
7. Have gender fairness issues included periodically in the discussions held at Bench/Bar Conferences.

### **Judicial Nominating Commissions**

Encourage the chairperson of each commission to communicate to members of their commission the importance of nominating sufficiently qualified judicial candidates regardless of race, ethnic origin, gender, age, religion, or disability.

## Chapter 2 - Courtroom Interactions

## Courtroom Interactions

Fundamental to an impartial system of justice is the treatment of all participants in a fair and dignified manner. Any difference in treatment, even if it appears to be insignificant by some, may be perceived as a sign of major inequities by others. Differences in perceptions vary, as reported by the Gender Fairness Task Force. The process in assuring equality of treatment and respect for all participants is an ongoing process and helps in improving perceptions of fairness.

### ***Recommendations:***

- ! Standards of bias free behavior for all participants in the judicial system should be incorporated into such documents as the Nebraska Code of Judicial Conduct and Code of Professional Responsibility.***

The Nebraska Code of Judicial Conduct and the Code of Professional Responsibility were reviewed for standards related to gender fairness. The Nebraska Code of Judicial Conduct contains language intended to impose upon judges the need to perform duties impartially and diligently. That language is specific as to gender. It is recommended that language be included in the Code of Professional Responsibility which mandates that lawyers refrain from manifesting, by words or conduct, bias or prejudice against parties, witnesses, counsel, or others based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. The language would not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding. The proposed language is intended to impose upon lawyers a duty similar to duties imposed upon judges under Canon 3 of the Nebraska Code of Judicial Conduct.

Because gender fair behavior should apply to all participants in the judicial system, not just judges and lawyers, it is recommended to have some method of educating participants which could also serve as reminders to those who are already “educated” but may be forgetful. It is proposed that a publication or a gender fairness handbook be available to all participants in the legal system. A draft publication is submitted which should be viewed only as a starting point. (See Appendix B.) It was created after the review of similar handbooks from several other states. The publication should be viewed as only one part of an effort to begin the long process of changing attitudes and the legal culture to meet the goal of eradicating gender bias.

## Chapter 3 - Domestic Violence and Sexual Assault

# Domestic Violence and Sexual Assault

The Gender Fairness Task Force report included evidence of perceptions of disrespect and lack of understanding of participants involved with crimes of domestic violence and sexual assault while participating in the judicial process. Several recommendations of the task force included proposals for legislative action. The Nebraska Supreme Court will neither introduce nor take policy positions on matters of proposed legislation. A specific subcommittee of the Gender Fairness Implementation Committee has been appointed to oversee the implementation of the task force recommendations in the area of domestic violence and sexual assault.

## **Recommendations:**

- !** *A specific subcommittee should be appointed to oversee the implementation of the recommendations in the area of domestic violence and sexual assault. The purpose of this subcommittee is to ensure that adequate resources are available for effective judicial management of sexual assault and domestic violence cases.*
  
- !** *Domestic violence and sexual assault are matters of serious civil and criminal conduct. A review of the bonding procedure and sentencing procedure in protection order cases should be undertaken, to ensure that adequate information is available to judges at such proceedings.*
  
- !** *Encourage the development of ongoing educational programs in the area of domestic violence and sexual assault. Written materials regarding domestic violence and sexual assault should be updated and included in the Nebraska Bench Book.*
  
- !** *A comprehensive, uniform data collection system regarding domestic violence and sexual assault cases should be developed and the information made retrievable on a statewide basis. The information should include:*
  - 1) Gender of crime victims and perpetrator;*
  - 2) Representation of the defendant;*
  - 3) Plea reduction data;*
  - 4) Disposition;*
  - 5) Prior criminal history of the defendant; and*
  - 6) Probation violation.*

## **Education of the Judiciary**

It is critical that the judiciary of this state be: (1) cognizant of the problems and complexities existing in the area of domestic violence; and (2) have the knowledge to effectively deal with the issues. The ongoing education of our judiciary is the most appropriate vehicle for obtaining these two goals.

## Method of Delivery

- A. County Judge New Orientation should be expanded to allow education on Domestic Violence. New District Court Judges should be required to attend this segment of the County Judge Orientation until a District Court Orientation Program is established.
- B. The same program developed for New Judge Orientation should be made available to all judges who have not previously attended this program.

## Legislation

The subcommittee is expected to oversee legislative proposals in the following areas.

### Bond Setting

Currently, § 29-901 of the Nebraska Revised Statutes allows a judge only to consider an individual's likelihood of appearance in court when setting bond. Although the Nebraska Supreme Court has allowed judges to consider additional factors, such as public safety, the subcommittee recommends that § 29-901 be amended to specifically address this issue.

The subcommittee will also address uniform bail schedules adopted in accordance with § 29-901.05 of the Nebraska Revised Statutes and their utilization in cases involving anyone charged with domestic assault or violation of a protection order. Whether anyone so charged should be eligible to bond out of jail without first appearing before the court at which time a judge can assess the allegations and impose bond appropriate under the circumstances is a matter for legislative consideration. This procedure, if adopted, has a further advantage of allowing a "cooling off period" between arrest and release. If such a procedure is adopted, it must be implemented so as to provide "prompt" judicial determinations of probable cause if arrest is without a warrant in compliance with the U.S. Supreme Court holdings in County of Riverside v McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991), and Gerstein v Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975).

### Protection Orders

The task force determined that the enforcement of protection orders issued pursuant to Neb. Rev. Stat. §§ 42-357 and 42-924 create a number of problems. The general practice in this state has been that once a judge of a district court enters a protection order, any enforcement of that order is handled in the county courts. This practice should be reexamined. The following example may be helpful in identifying the reasons for concern: Assume a defendant is brought before a county court for violation of a protection order issued by a district court judge. At the defendant's arraignment, the county court judge has no information or background setting forth the reasons for the issuance of the protection order. This information is critical for purposes of setting bond and imposing appropriate sentences upon a plea. For example, the sending or delivery of a letter or package by defendant to the protected person may not appear to be a "serious" violation to a county court judge unless the judge has information that one of the bases for the original entrance of the order was a threat by the defendant to use an explosive device to injure the protected person. The problems inherent with one court enforcing the orders of another court can be minimized if the court that issues the order enforces it.

To the extent the enforcement of protection orders is issued by the district court continue to be prosecuted in the county court, it is recommended that all such complaints include a copy of the protection order.

The subcommittee also studied the various applications used in the district courts of this state for the purpose of issuing protection orders. This study concluded that there is no “standard” application used in our court system. There is a concern that some of the applications currently do not contain sufficient information to aid the court in determining if a protection order should be issued, and if so, what its terms should include. The following is an example: Assume a defendant is arrested in a domestic violence case and subsequently bonds out in the county court. Thereafter, the victim in the county court case applies for a protection order in the district court. A problem often arises under this situation because the district court does not know that the defendant is currently out on an appearance bond from county court and the specific conditions of that bond. The county court bond may contain a no contact provision with the spouse or children while at the same time, the district court’s protection order may not contain similar non-contact restrictions. The result is unnecessary confusion which could effect enforcement to the detriment of the protected parties. The subcommittee proposes an application addressing such issues and which could serve as a model if it is concluded that a uniform application for our court systems would be appropriate. See Appendix C for a copy of the proposed application.

### **Establishment of a statewide registry of protection orders**

The primary purpose of a state registry is to provide greater protection for victims of domestic violence and their families. By increasing the amount of information available to law enforcement, the justice system is better able to enforce and uphold laws designated to protect individuals from acts of violence. Fourteen states and Puerto Rico have recently passed legislation to establish registries, and several other states have legislation pending.

In 1994, the National Counsel on Juvenile and Family Court Judges released a publication entitled, “A Model State Code on Domestic Family Violence.” This model code contains recommendations for statutory reform in a number of areas involving domestic and family violence. Section 315 of the Model Code reads as follows:

#### **SEC. 315. STATE REGISTRY FOR ORDERS FOR PROTECTION**

1. The appropriate state agency shall maintain a registry of all orders for protection issued by a court of this state or registered in this state. The orders must be included in the registry within 24 hours after issuance or registration.
2. The information contained in the registry is available at all times to a court, a law enforcement agency, and other governmental agency upon request.

Section 315 of the Model Code provides a workable framework for the legislative enactment of a state registry. In the state of Nebraska, the “appropriate statewide agency” as noted in Section 315 of the Model Act, would be the Nebraska State Patrol and more specifically, the State Patrol’s existing NCIS system.



It is recommended that legislation establishing a statewide registry requires, at a minimum, the following:

1. A requirement that the clerk of any court issuing a protection order, transmit protection order information to the State Patrol's NCIS system within 24 hours after issuance.
2. Require the law enforcement agency serving the protection order to notify the registry that the protection order has been served upon the respondent, and to provide the registry with the order's "expiration" date.

Finally, the Violence Against Women Act of 1994, PUB. L. No. 103-322, Title IV, 108 Stat. 1902-55 sets forth two state "requirements" which may make the establishment of a statewide registry necessary to implement those "requirements." These include (1) requiring states to give full faith and credit to protection orders issued in foreign states or tribunal courts, and (2) prohibiting access to firearms to persons who have protection orders issued against them. It is the subcommittee's belief that the establishment of the state registry proposed herein could also be utilized by the State in implementing the federal requirements of the Violence Against Women's Act of 1994.

### **Penal statutes and domestic assault**

Strong consideration should be given to develop legislation defining "Domestic Violence." Currently, the only statutory scheme with any direct application or recognition of "Domestic Violence" is the Protection From Domestic Abuse Act found in Chapter 42 of the Nebraska Revised Statutes. That Act is limited in its scope to protection and restraining orders. It is the subcommittee's recommendation that criminal acts of domestic violence that do not include the violation of a protection or restraining order also should be specifically addressed in Nebraska statutes. There are several reasons for this recommendation.

The general public is becoming more aware of the high incidence of domestic violence and its impact on families and society. Efforts to combat domestic violence are increasing dramatically with this awareness. One very troubling realization is the apparent recidivism associated with battering behavior. It is this realization that leads the subcommittee to recommend that legislation be developed to create enhanced penalties for repeat offenses of domestic violence. The subcommittee's recommendation begins by creating a separate crime of "domestic assault." The penalty for a first offense of domestic assault would be up to 6 months in jail and/or up to a \$500 fine, a second offense would be a Class I misdemeanor carrying up to 1 year in jail and/or a \$1,000 fine, and a third or subsequent offense would be a Class IV felony carrying up to 5 years in prison and/or a \$10,000 fine.

Development of a "domestic assault" statute would also create a means by which statistical information could be gathered across the state. Currently, it is extremely difficult to determine statistically how many domestic violence cases are actually prosecuted because in most jurisdictions there is no separation between or identification of this type of assaultive behavior versus any other non-domestic assaults. An increasing importance is being placed on states and local governmental agencies to compile this type of statistical information. The federal government has become more and more involved in efforts to assist states with resources to prosecute cases, provide services to victims and create multi-disciplinary approaches toward reducing the incidence of domestic violence. In

order to meet the eligibility requirements for many, if not all, of the grants available statistical documentation is a must. Further, in trying to determine where, in a state like Nebraska, those resources should be directed in order to serve the most affected populations, it is important to be able to analyze comparative data that is uniformly gathered.

Additional steps that merit future consideration is expanding the definition of "domestic violence" to include crimes committed under other currently existing criminal statutes and that if a crime of "domestic violence" is committed, the penalty is one level higher than the existing penalty. For example, if someone commits a First Degree False Imprisonment and the victim is someone who falls under the "domestic violence" definitions, that crime instead of being a Class IV felony would now be a Class III felony. A number of offenses would be eligible for this type of penalty enhancement including but not limited to Terroristic Threats, 1st and 2nd Degree Assaults, False Imprisonment, and Kidnaping.

## Chapter 4 - Litigation

# Litigation

## *Recommendations:*

- !** *Periodically examine civil and criminal jury instructions contained in the Nebraska Jury Instructions for recommendations regarding possible amendments to eliminate subtle forms of gender discrimination.*
- !** *Subcommittees should identify a funding source for a study to be conducted to determine the degree to which the economic burden of divorce is falling disproportionately upon mothers with children and single women.*

## **Civil and criminal jury instructions used in Nebraska**

The subcommittee on litigation reviewed the Nebraska Jury Instructions, as reported at NJI2d (West Publishing Co. 1989). It appears that there is no particular gender bias inherent in civil or criminal jury instructions used in Nebraska. The 1989 edition of the jury instructions certainly incorporated the need for gender neutrality in such issues as male and female pronouns when referencing parties. For example, NJI2d 2.01 calls upon the parties to make reference to the plaintiff as he or she, and that type of sensitivity flows throughout the patterned Nebraska Jury Instructions.

The subcommittee discussed other issues including the possible bias in the area of jury instructions as it related to economic damages in the civil area, as well as jury instructions as it related to sentencing in the criminal area. No inherent bias was found in the wording of the Nebraska jury instructions. Periodic examination of patterned civil and criminal jury instructions serve as a safeguard against unintended gender bias.